ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Suit No.1126 of 2013

Date	**Order with signature of Judge**

Present:
Mr. Justice Muhammad Ali Mazhar

Hamza Haneef Awan & others.....Plaintiffs

VERSUS

Sher Ali Mengal & others.....Defendants

For hearing of CMA No.13776/2013.

Date of hearing: 19.04.2018.

Mr. Mohammad Ameen Motiwall, Advocate for Plaintiffs along with Plaintiff No.1 (Hamza Haneef Awan).

Malik Fiaz Ahmed Khakh, Advocate for Defendant Nos.2 to 9 along with Defendant No.5 (Wajid Khan Afridi).

Mr. Rafiq Ahmed Kalwar, Advocate for Defendant No.10.

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Muhammad Ali Mazhar, J. The plaintiffs have brought this suit for rendition of accounts and permanent injunction. The short-lived facts of the case are that the plaintiff No.1 provided transport services to the defendant No.10 for supplying oil to Afghanistan for NATO forces. In order to fulfill this contractual obligations, he engaged the services of plaintiff Nos.2 to 8 against some valuable consideration. The amount of advance payment and service charges were liable to be adjusted between them at the close of business. It is further avowed that the plaintiffs and defendant Nos.1 to 9 were eventually offering services for the benefit of defendant No.10. The business venture was inaugurated between the plaintiffs and defendant Nos.1 to 9 in the year 2006 but the

last trade operation was completed in the month of October, 2011 thereafter the defendant No.1 disappeared, consequently the defendant Nos.1 to 9 catch hold of business under the umbrella of Mengal Transport. The defendant Nos.1 to 9 have failed to settle the claims of the plaintiffs. The plaintiff No.1 finalized the accounts and delivered the copy in the office of Mengal Transport. It is further alleged that the defendant No.10 made out a policy whereby the vehicles registered under the transport arrangement are not considered for use by any other transporter unless NOCs are obtained from the former hence the defendant No.10 is liable to entertain the use of vehicles of the plaintiffs and in this regard a mandatory injunction has been sought. In the prayer clause a preliminary decree and a final decree for the settlement of accounts have been sought by the plaintiff No.1 against the defendant No.1 or the person running the affairs of Mengal Transport with a decree of permanent injunction that the defendant Nos.1 to 9 shall not interfere with the movement and business being conducted by the plaintiffs by their vehicles, however in the last prayer a mandatory injunction has been sought against the defendant No.10 to use the vehicles of the plaintiffs.

2. The record reflects that the defendant No.1 has already been declared ex-parte vide order dated 15.01.2018. On notice, the defendant No.10 filed the application under Order 1 Rule 10 (2) CPC with the prayer that the plaintiff has no cause of action against the defendant No.10, therefore, the name of the defendant No.10 be struck off from the array of the defendants.

3. The learned counsel for the defendant No.10 argued that the defendant No.10 is engaged in the business of marketing of oil and lubrication throughout the country. To make sure

an efficient transportation network of oil and lubrication at different destinations, the transport arrangement was outsourced to different transporters through service contracts. The defendant No.10 executed an agreement dated 01.01.2011 which expired on 31.12.2011. Under the terms and conditions of the transportation agreement (clause 3.4), it was the responsibility of the defendant No.1 to provide vehicles for the transportation of defendant No.10's oil and lubrication and the defendant No.1 was also responsible to comply with all statutory requirements and obligations. The defendant No.1 made a request to the defendant No.10 to enlist some vehicles under the cartage contract executed by the defendant No.1 with some transporters. There is no privity of contract between the defendant No.10 and the plaintiffs but they were providing the alleged services to the defendant No.1 under their own terms and conditions of the contract which has nothing to do with the defendant No.10. He further argued that under the transport agreement with the defendant No.1, he fully indemnified the defendant No.10 from all claims and losses. The defendant No.10 has no knowledge of any subsequent cartage agreement executed by the defendant No.1 with the plaintiffs for availing their services. The plaintiffs have also failed to point out any provision of the transportation agreement executed between the defendant No.1 and defendant No.10 to substantiate their claims directly or indirectly against the defendant No.10.

4.The learned counsel for the defendant Nos.2 to 9 frankly conceded that the cartage agreement was executed between the plaintiffs and defendant Nos.1 to 9 and the plaintiffs alleged claim of unpaid liability is against defendant Nos.1 to 9. He also admitted that in the agreement executed by the defendant No.1 with the defendant No.10, there is no such

clause in which the defendant No.10 could be made liable for any payment directly to the plaintiffs under the cartage agreement. He endorsed his no objection if the name of the defendant No.10 is struck off from the plaint.

5. Quite the reverse, the learned counsel for the plaintiffs articulated that the defendant Nos.1 to 9 have taken a plea that since the defendant No.10 stopped their payment, therefore, the dues were not paid. He further argued that the defendant No.10 was claiming some amount against the shortage, therefore, they have been made party in this suit as a proper and necessary party, however, when the court confronted him the prayer clauses which are virtually against the defendant Nos.1 to 9 except one prayer in which the mandatory injunction has been sought against the defendant No.10 to utilize the transport services of the plaintiffs against their will, the learned counsel could not supplement further.

6. Heard the arguments. The veneer of the lawsuit intensely articulates that precisely this is a suit between the plaintiffs and defendant Nos.1 to 9 for the settlement of some unpaid dues for which the plaintiffs have also claimed rendition of accounts. This is a fact that the plaintiffs have no privity of contract with the defendant No.10. They have further admitted that the defendant No.1 had engaged the services of the plaintiffs and hired their vehicles under the cartage contract. No doubt if the plaintiffs have any claim they can obviously press and pursue against the defendant No.1 and when the plaintiffs have themselves pleaded that on disappearance of defendant No1, their claim survives and continues against the defendant Nos.2 to 9 who are now basically running the affairs of Mengal Transport. The counsel for the defendant Nos.2 to 9 self-confessed that if

the plaintiffs are ready to approach, the defendant Nos.2 to 9, they may sit together for reconciliation and sort out the claims vice versa. For all intents and purposes, this can be resolved once their accounts are reconciled properly if they agree to sit together or at any later stage when the evidence is recorded or rendition of accounts are ordered by this court through preliminary decree.

7. However for the decision of application in hand, the court has to catch sight of whether the plaintiffs have any cause of action against the defendant No.10 or not. In my considerate view on examining the record, it is obvious that there is no privity of contract between the plaintiffs and defendant No.10 and there is no case here in which the vicarious liability can be shifted on the defendant No.10 for the failure of obligations by the defendant Nos.1 to 9 with the plaintiffs.

8. In the case of **Mari Gas Company Ltd. vs. Byco Petroleum Pakistan Ltd.,** reported in **PLD 2013 Sindh 314, (authored by me)** I have discussed the precision and diligence of proper and necessary party vis-à-vis accrual of cause of action and held that in order to decide the disputed questions, proper pleading is essential pre-requisite. It is for the reason that much importance has been given to incorporate all necessary particulars in the plaint as envisaged under Order VII, Rule 1, C.P.C. The facts constituting cause of action have to be pleaded and where the plaint does not disclose the cause of action it is not a plaint in the eye of law. Cause of action is bundle of facts which are alleged by the plaintiff to secure the relief sought by him. The prayer clause is the substance of plaint where no relief is claimed in the plaint, it must be looked into as a whole to determine what kind of the relief is decipherable

from the plain reading of plaint. Under Order I, Rule 10, C.P.C. the court may at any stage of proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, may order that the name of any party improperly joined be struck out. When no relief was sought against a person otherwise his presence was not necessary to enable the court to settle the controversy, such person may not be added as defendant. A party should be joined to the suit if its presence is required for complete and conclusive adjudication of the suit. The necessary party is the one whose presence on record is enjoined by law or in whose absence no effective decision can be given. If a dispute can effectively be adjudicated in absence of a person, such person is not a necessary party. While proper party is a person if its presence before the court is necessary to enable it to effectually and completely adjudicate upon and settle the questions involved in the suit and it is not necessary that the plaintiff must seek relief against such proposed defendant. The object of adding proper party is to avoid needless multiplicity of the suit. It is also well settled that where there is no cause of action against any such defendant, his name may be struck off from the plaint. Though the plaintiff is dominus litis but the theory of dominus litis cannot be overstretched in the matter of impleading the parties because it is the duty of the court to ensure that if for deciding the real matter in dispute a person is necessary or proper party the court can order to implead such person and vice versa can also order deletion of any such person from the plaint who is not found to be proper or necessary party. What makes a person a necessary party is not merely that has relevant evidence to give on some questions involved that would only make him necessary witness. The only reason which makes it necessary to make a person a party to an action is so that

he should be bound by the result of action. Who are united in interest must be joined as plaintiffs or defendants. In the absence of the joinder of a necessary party a valid judgment cannot be rendered. A party is not a necessary party simply because a pending action might have some impact on the party's rights, or otherwise affect the party. Instead, a person whose interests may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others is a proper' party but not a necessary party. The provision of Order I, Rule 10, C.P.C. does not mean that any person who has distinct or indirect relationship or connection with either the plaintiff or defendant ought to be joined but he must be directly and substantially connected with the issue which have to be adjudicated by the court.

9. The cartage agreement between the defendant Nos.1 to 9 with the defendant No.10 was a commercial contract with certain niceties and nitty-gritties in which only the parties had decided the mutually agreed terms in which the defendant Nos.1 to 9 were responsible to arrange the transport for the swift transfer of defendant No.10's products at different destinations, whereas the cartage agreement between the plaintiffs and defendant Nos.1 to 9 was for their own working relationship and consumption in which only the parties were bound to fulfill and adhere to agreed terms and conditions but such agreement has nothing to do with the defendant No.10. So for all intents and purposes, both agreements have their different practicalities and fundamentals neither they can overlap nor override the other.

10. Seemingly, the plaintiffs under no provision of law can compel the defendant No.10 to utilize their services under

compulsion or reluctant relationship. To constitute a valid contract between parties one of the essential conditions is consensus ad idem with regard to all terms of contract. In my considerate view, no declaration can be granted by this court which has not been claimed otherwise except a prayer in the nature of mandatory form that the defendant No.10 should utilize the services of the plaintiffs directly without any agreement with them. The court cannot force or compel the defendant No.10 to enjoy the services of the plaintiffs without their willingness or agreement. The conditions of essential validity of any agreement are (i) competent parties; (ii) existence of consent of parties; (iii) consent being free; (iv) existence of consideration; (v) consideration and object being lawful and (vi) the agreement not being expressly declared to be void. By the looks of it, neither the cartage agreement between the defendant No.1 and defendant No.10 can be classified or categorized the relationship of master and servant, employer and employee or principal and agent nor the plaintiffs have any privity of contract with the defendant No.10 which can be specifically enforced in this suit.

11. By dint of discussion, the application moved under Order 1 Rule 10 (2) CPC (CMA No.13776/2013) is allowed, the name of defendant No.10 is struck off from the array of the defendants which is neither necessary party nor proper party. The learned counsel for the plaintiffs is directed to file the amended title.

Karachi:-
Dated.22.5.2018 **Judge**